No. 74-70

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

vs.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE INSTANTER AND PROPOSED BRIEF AMICUS CURIAE OF THE AMERICAN DENTAL ASSOCIATION

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MOTION OF THE AMERICAN DENTAL ASSOCIATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Now comes the American Dental Association, an Illinois not-for-profit corporation, by Owen Rall, Peter M. Sfikas and Paul J. Petit, its attorneys, and moves this Court for leave to file a brief amicus curiae for the following reasons:

1. The American Dental Association, an Illinois not-for-profit corporation, is a voluntary dental association with approximately 105,500 fully privileged members, all of whom are dentists licensed to practice in the various states of these United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States. The object of the American Dental Association as set out in its Constitution is:

> "The object of this Association shall be to encourage the improvement of the health of the public, to promote the art and science of dentistry and to represent the interests of the members of the dental profession and the public which it serves." (Constitution of the American Dental Association, Article II)

2. A decision of this Court with respect to whether or not the "learned professions" are subject to the application of the federal antitrust laws will have a material effect on the dental profession especially with respect to the American Dental Association's application of its Principles of Ethics. Likewise, the decision in the instant case will have a material effect on the American Dental Association's constituent and component societies. The constituent societies are composed of the state and other similar jurisdiction dental associations and the component societies are the city or local dental associations of the various states of the United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States.

3. Inasmuch as this Court has certified in connection with granting the writ of certiorari the question of whether the minimum fee schedule at issue is exempt from the antitrust laws by reason of the legal profession being a "learned profession" it is suggested that this Court will wish to consider the public policy considerations con-

tained in the proposed amicus curiae brief before reaching its decision especially with respect to the impact that a holding that the learned professions are subject to the antitrust laws will have on the Principles of Ethics of the American Dental Association and all state and local dental associations who are constituent and component societies of the American Dental Association.

4. In preparing the brief amicus curiae, every effort has been made to avoid mere repetition of arguments made by the parties and the amici curiae, the United States Department of Justice and the American Bar Association.

5. The proposed amicus curiae brief relies principally on the effect that this decision will have on the professional and scientific activities of the American Dental Association and its constituent and component societies and, to the extent that a legal argument has been made, it is concise and presents an approach somewhat different from that which has been presented in the other amici briefs.

6. The amici curiae who have already been permitted to file briefs in this Court either represent or deal exclusively with the application of the antitrust laws to bar associations. The American Dental Association believes that this Court should be aware of the impact of this decision on a learned profession other than the legal profession.

7. The Fairfax County Bar Association has not consented to the filing of this proposed amicus curiae brief and it is for this reason that this motion is being filed.

8. This motion and the proposed brief are being filed in support of the respondents' position and are being presented within the time allowed for respondents' brief.

WHEREFORE, the American Dental Association respectfully requests leave to file instanter its attached brief amicus curiae.

Respectfully submitted,

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BRIEF FOR THE AMERICAN DENTAL ASSOCIATION AS AMICUS CURIAE

Statement Of Interest Of The American Dental Association

The writ of certiorari in this case issued upon a petition delineating three issues on the record before this

Court, including the question of the applicability of the antitrust laws to the learned professions. A determination of that issue by this Court will therefore substantially affect not only the activities of the American Dental Association as a nationwide professional association, but also the activities of its dentist members and each state and local dental society which comprise its constituent and component societies.

The American Dental Association respectfully submits this Brief Amicus Curiae in support of affirmance of the court of appeals' determination that the antitrust laws should not be judicially extended to constrain activities of the learned professions.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT HAS NOT EVER EXTENDED THE APPLICATION OF THE ANTITRUST LAWS TO THE LEARNED PROFESSIONS AND ANY DETERMINATION THAT THE ANTITRUST LAWS SHOULD APPLY MUST THEREFORE BE MADE BY CONGRESS

The activities of professional associations have not ever been held by this Court to be within the reach of the antitrust laws. Although this Court has had several opportunities to embrace a definitive application of the antitrust laws to the professions it has chosen not to do so. However, the history of this Court's failure to apply the Sherman Act to the learned professions has created if nothing else a *de facto* determination that the learned professions are exempted from the antitrust laws.

Because other parties to this appeal have fully traced the historical genesis for this learned profession exemption, we shall touch upon it only in passing. However, a brief discussion of the learned profession exemption history is essential to the development of the American Dental Association's position on this appeal.

The history begins with Mr. Justice Holmes' observation in *Federal Baseball Club of Baltimore* v. *National League*, 259 U.S. 200, 209 (1922):

> "... a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state."

Thereafter this Court in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944), specifically approved the foregoing language.

Although this Court expanded the scope of the Sherman Act concept of "trade or commerce" to include the rendition of personal services in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932), and *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950), both of those decisions quoted with approval Mr. Justice Story's definition of the term "trade" in *The Nymph*, 18 F.Cas. 506, 507 (C.C.D. Me. 1834):

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." (286 U.S. at 436, 339 U.S. at 490-91)

Although this definition was used as a means of expanding Sherman Act Jurisdiction, its use nonetheless conveyed a judicial awareness that learned professions are not within the parameters of those business activities considered trade or commerce for purposes of the Sherman Act. Further, no decision of this Court has extended the rationale of the *Atlantic Cleaners* and *Real Estate* cases that services are trade or commerce to bring the rendition of professional services within the penumbra of the Sherman Act. Instead, in *Real Estate*, this Court declined the opportunity to rule on the applicability of antitrust regulation to professional activities (339 U.S. at 491-92).

In *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), this Court again provided support for the conclusion that the learned professions were outside the Sherman Act regulatory scheme. In analyzing the record in that case, this Court noted that in order to sustain the Commission's order, it

was necessary to find an injury to competitors. There was no evidence that respondent had any competitors. Certainly, medical practitioners did not compete with respondent, for:

> "Of course, medical practitioners, by some of whom the danger of using remedy without competent advice was exposed, are not in competition with respondent. *They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.*" (emphasis supplied; 283 U.S. at 653)

In *American Medical Association* v. *United States*, 317 U.S. 519 (1943), this Court rejected a determination by the court of appeals that the restraint of trade prohibition of the Sherman Act could apply to the practice of medicine. Here, this Court granted certiorari to consider three questions, two of which were: 1) Whether the practice of medicine and the rendition of medical services constitute "trade" under §3 of the Sherman Act and 2) Whether there was charge and proof of "restraints of trade" under §3 of the Sherman Act. The decision in the A.M.A. case did not require an answer to the first of these questions, since the medical co-operative whose activities the defendants had restrained was held to be engaged in commerce. Thus, since the alleged restraint acted upon an extra-professional commercial activity, the question of the application of the Sherman Act to the internal regulation of a profession by a professional society went unanswered:

> "Much argument has been addressed to the question of whether a physician's practice of his profession constitutes trade under §3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question." (317 U.S. at 528)

Therefore, though the question of the scope of antitrust constraint on self-regulation of professional organizations persisted, the fact that there remained a question at all, and the fact that this Court did not see fit to dispatch this theory of professional "exemption" add strength to the explicit expression of prior cases that professional activities of the learned professions are not "trade or commerce".

Moreover, in *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952), this Court again faced the question of the potential application of the Sherman Act to professional activities and again declined to hold categorically that professional practice and self-regulation by professional associations were "trade or commerce".

While noting that affirmance of the court of appeals required no new interpretation of the statute and presented no material questions of law, this Court nonetheless felt it necessary to comment on the possible inapplicability of the Sherman Act to matters of professional self-regulation:

> "Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. *We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters.* This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L.ed. 1086, 55 S.Ct. 570." (emphasis supplied, 343 U.S. at 336)

Clearly, the above brief history demonstrates that to the extent this Court has dealt with the application of the

antitrust laws to the learned professions, it has registered serious concern with respect to whether the professions should be governed by the antitrust laws if it did not create a de facto exemption.

The status of the learned professions as "exempt" from the reach of the antitrust laws stands on at least the same footing as the decision of this Court in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), which withheld baseball from the reach of the antitrust laws based upon this Court's decisions in *Federal Baseball Club of Baltimore* v. *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953). Although *Federal Baseball* and *Toolson* are clear holdings that baseball is exempted and the learned profession exemption may be technically dicta in the various decisions of this Court treating with this subject matter, the rationale for not applying the antitrust laws to baseball in *Flood* is even more persuasive on the question of not extending the antitrust laws to the professions in the case at bar.

Despite much criticism of Mr. Justice Holmes' opinion in *Federal Baseball*, this Court in *Flood* analyzed the upholding of the baseball exemption in *Toolson* as follows:

> "(a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction.
>
> (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws.
>
> (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect.
>
> (d) A professed desire that any needed remedy be provided by legislation rather than by court decree." (407 U.S. 258, 273-74)

The court in *Flood* also noted in passing Mr. Justice Clark's reference to *Federal Baseball* in *Radovich* v. *National Football League,* 352 U.S. 445, 450 (1957), wherein he stated:

> " '. . . combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.' "

With respect to the foregoing grounds which the *Toolson* Court relied upon for upholding the decision in *Federal Baseball* and which the *Flood* Court looked favorably upon, applied to the instant case, we discern the following: clearly, Congress must be aware of the history in this Court of the "learned profession exemption". Although there has not been the stream of legislation introduced in Congress on the question of the professional exemption as there was for baseball, nevertheless the inaction of Congress in not attempting to provide specific legislation to cover the professions should be at least as persuasive as the congressional inaction for baseball. Indeed, as Mr. Justice Douglas urges in his dissenting opinion in *Flood,* the fact that Congress refused to enact bills broadly exempting professional sports from antitrust regulation might well indicate a legislative intention not to exempt baseball from the antitrust laws (407 U.S. 258, 287-88). There has been no such refusal by Congress in connection with the learned professions.

The interest in applying the antitrust laws to the learned professions has for the most part been a current interest developing within the last three or four years. We need not belabor this Court with citations to secondary source material interpreting this Court's decisions and other fed-

eral district and circuit courts of appeals' decisions for the broad proposition of an exemption for the learned professions. See, *e.g., A Supplement to the Report of the Attorney General's Committee to Study the Antitrust Laws, Antitrust Developments,* 215-216 (1968). There can be little doubt that the learned professions, relying on the history of this exemption, considered themselves immune from the reach of the antitrust laws and as a result their development of principles of ethics and education and training of members of their professions have progressed upon the understanding that they were exempt from federal antitrust laws. For this Court in 1975 to render a decision subjecting the learned professions to the antitrust laws with its consequent retroactive effect would cause nothing less than an upheaval in the day-to-day workings of the professions. It necessarily follows that if in the public interest it is determined that the antitrust laws should be applied to the professions this should be done in the legislative branch of our government.

As Judge Moore of the Second Circuit stated with respect to baseball, and which is equally applicable to the professions, in his concurring opinion in the court of appeals decision in *Flood* v. *Kuhn,* 443 F.2d 268, 272:

> "Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record."

Manifestly, the legislative branch of our government is best able to weigh the competing public policy considerations necessary to determine whether the learned professions should be subject to the antitrust laws.

II.

THE IMPACT OF A DECISION THAT THE ANTITRUST LAWS APPLY TO THE PROFESSION OF DENTISTRY WOULD CAUSE A RESTRUCTURING OF THE PROFESSION WHICH IS NOT IN THE BEST INTERESTS OF THE RECIPIENTS OF DENTAL CARE OR THE PROFESSION

Among the primary functions of the American Dental Association are the following: regulating the members of the profession through its Principles of Ethics, assuring the public that the members of the profession and the members of various specialty societies are well educated and trained to perform their profession in accordance with the highest qualitative standards, and approving the use of dental products and materials which conform to standards in the best interest of the recipients of dental care. Necessarily each of these functions carries with it some degree of possible restraint. Indeed, the very efficacy of some of these programs requires some form of enforcement or restraint. To this extent these activities are all subject to possible antitrust attack on various grounds. group boycotts, see, *e.g., Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600 (1914); *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457 (1941); standardization of dental products and materials which might make for a uniform price and as such a possible *per se* violation, see, *e.g., C-O-Two Fire Equipment Co.* v. *United States,* 197 F.2d 489, 493 (9th Cir. 1952); *Milk and Ice Cream Can Institute* v. *FTC,* 152 F.2d 478 482 (7th Cir. 1946). Likewise, any attempt by any dental association to work with third party carriers (insurance or otherwise) to offer realistic, worthwhile coverages to provide reasonable assurance that a means toward good oral

health is being made available for dental work may well come in conflict with this Court's admonitions in *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Of course, the fact that the American Dental Association would be acting in the best interests of both the profession and the recipients of dental care would not be a defense to any of the above activity which might be held to be a *per se* violation, see *e.g.*, *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941).

Perhaps the area where a decision in this case applying the antitrust laws to the learned professions would work its most harm would be the enforcement of the Principles of Ethics not only by the American Dental Association but also by each of the state and local societies as well.

In this connection it can be urged that any attempt at self-regulation by an association of professionals which goes beyond mere dissemination of information and which has an arguably restraining effect upon the dental profession would be rendered a restraint of trade potentially violative of the antitrust laws. As noted, in those areas where the restraint could be categorized as parallel to commercial activity that would be a *per se* violation of the antitrust laws, the professional association would be unable to present a defense based upon the public policy necessity of its self-regulatory action. Where an action would be brought on a violation the nature of which would require the application of the rule of reason in a commercial setting, the resolution of the conflict between self-regulation and antitrust restraint of competition would require an analysis of professional activities for which the judicial system is ill-adapted. Though competence in a strictly commercial analysis is imputed to the courts by the continuing application of the rule of reason and *per*

se rules in a strictly business setting there is no indication that the judiciary is equally competent to analyze the reasonableness of professional activities which, while maintaining the quality of professional practice, incidentally restrain the activity of the professional practitioners, or others. Such determinations should be more appropriately made through the expert opinion of those daily engaged in the subject profession, as has been the case since the development of professional associations.

We submit that as to the practice of dentistry, numerous conflicts between the self-regulation of the profession through the American Dental Association Principles of Ethics (the relevant sections of the American Dental Association's Principles of Ethics are printed in full in the attached Appendix) and the constraints of the antitrust laws demonstrate the need for legislative determination of the efficacy of extending the scope of antitrust regulation to include professional activities, if indeed there should be any application of the antitrust laws to the professions. Among these are prohibition of advertising and solicitation of patients (Section 12 *infra* App. 3) and rebates or split fees (Section 9 *infra* App. 3); limitations on and regulation of use of professional titles (Section 15 *infra* App. 4) specialty practice (Section 18 *infra* App. 5), listing of dentists' names in professional directories (Section 19 *infra* App. 5); patents and copyrights on fruits of research (Section 11 *infra* App. 3), use of secret techniques and medications (Section 10 *infra* App. 3); use of auxiliary quasi-professional personnel (Section 6 *infra* App. 2) and rendition of emergency service (Section 5 *infra* App. 2).

Therefore, imposition of antitrust regulation on professional practice would shift the burden of supervision

from the professional associations to the courts. Since, during the history of non-application of the antitrust laws to the professions, professional associations have been allowed and required to develop standards of self-regulation, a decision on the application of the antitrust laws to the professions and the concomitant evisceration of associational self-regulation rests most properly with the Congress or State legislatures (Board of Examiners).

The possibly destructive impact of antitrust constraints on the self-regulation by professional associations was recognized by the court of appeals decision in this case wherein it stated:

> "Any action on this subject matter by a legislative body will clearly be prospective. The ramifications of a judicially initiated extension of the coverage of the Sherman Act is less certain. The potential of the retroactive application of such a judicial extension coupled with the doubt it would cast upon the continuing viability of other ethical restrictions would create confusion in a profession where order is essential." (497 F.2d at 19)

This recognition of the difficulty of applying the antitrust laws to the professions is no different from what this Court observed in *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), wherein a dentist challenged a state statute regulating advertising by dentists on due process grounds and wherein this Court stated:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct

> from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.'' (294 U.S. at 612)

The above analysis should be employed by this Court to affirm the decision of the court of appeals.

CONCLUSION

For years the dental profession, and other learned professions, have been allowed to regulate their profession unmolested by the threat of antitrust enforcement. The numerous improvements and advances in dental technique and dental education make it manifest that the profession of dentistry on public policy grounds need not be subject to the application of the antitrust laws. In an analogous situation, this Court has determined that the intention of Congress in enacting the antitrust laws was not to subject baseball to the proscriptions of the antitrust laws. There are far more persuasive public policy considerations justifying this same conclusion with respect to the learned professions. The reason for seeking leave to file this brief amicus is to make it clear to the Court that the instant decision will have far reaching ramifications on the continued excellence of the dental profession. Ac-

cordingly, it is respectfully requested that this Court affirm the court of appeals decision with respect to the "learned profession" exemption, or put another way the non-application of the antitrust laws to the learned professions.

Respectfully submitted,

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